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In The
Supreme Court of the United States
October Term, 1996

STATE OF WASHINGTON, ET AL.,
Petitioners-Appellants,

v.

HAROLD GLUCKSBERG, ET AL.,
Respondents-Appellees.

**On Appeal From The United States Court
Of Appeals For The Ninth Circuit**

**BRIEF FOR THE NATIONAL SPINAL CORD
INJURY ASSOCIATION, INC., AS
AMICUS CURIAE SUPPORTING APPELLANTS**

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**INTEREST OF THE NATIONAL SPINAL CORD
INJURY ASSOCIATION, INC.**

The National Spinal Cord Injury Association, Inc. ("NSCIA") is the largest civilian organization in the United States dedicated to improving the quality of life of persons disabled by spinal cord injury. The NSCIA was founded by the Paralyzed Veterans of America in 1948 and, until its relocation to the Washington, D.C. area in July, 1996, was headquartered near the medical and rehabilitative communities in Boston, Massachusetts.

Its members are among the more than 250,000 Americans paralyzed as a result of injury and disease to the spinal cord.

Spinal cord injury is regarded by many, particularly those who have only collateral experience with persons so afflicted, as constituting one of the most debilitating and tragic of human conditions. Cases of extreme spinal cord injury have been cited as illustrating the type of impairment (especially during the early days after an injury) which may warrant or support a desire in the disabled individuals involved to hasten their death.

The NSCIA has a unique knowledge of, and experience with, all types of spinal cord injury ("SCI") and with the profound quality of life issues which confront both newly disabled individuals and persons with long histories of spinal injury. The NSCIA has established a network of over 30 local chapters and support groups nationwide for the spinal-injured, their families, and the professionals involved with their care. The NSCIA also operates a national toll-free referral hot line which fields thousands of inquiries each year from newly injured individuals and others, promotes nationwide peer counseling groups, and maintains a 60,000-item library -- the largest and most current resource center in the world with information about spinal cord injury.

The NSCIA's formal mission is "to enable people with SCI to make choices and take actions to achieve their highest level of independence and personal fulfillment." The organization has a unique, real world insight and perspective on some of the core assumptions expressed by the United States Court of Appeals for the Ninth Circuit in this "assisted suicide" case. To the best of its knowledge, the NSCIA has never in its 48-year history participated as an *amicus curiae* in any case before this Court. On this occasion, however, owing to its mission statement and the responsibility it feels to its past, present, and future clients and members, the NSCIA is compelled to submit this brief to address certain profound misconceptions contained in the lower court's

decision, which violates American tradition and jurisprudence and which establishes a dangerous and socially undesirable precedent -- as a matter of constitutional law, ethics and moral responsibility.

SUMMARY OF THE ARGUMENT.

In purporting to fashion a new substantive due process "right," the Ninth Circuit misconstrued this Court's decision in Roe v. Wade and its progeny. (pp. 4-5). The lower court failed to address the paramount effect of Natural Law in the circumstances (pp. 5-8) and failed to recognize that the unalienable Right to Life, which has not been implicated in the prior abortion decisions of this Court, predominates and invalidates the necessarily qualified liberty interest in assisted suicide which the lower court has created. (pp. 8-12). A right-to-die is not "implicit in the concept of ordered liberty," (pp. 12-15), nor was such purported "right" presaged or mandated by this Court's decision in Cruzan v. Director, Missouri Dept. of Health. (pp. 15-17).

The Ninth Circuit gave inadequate weight to the State's interest in protecting the disabled from being indirectly and unduly encouraged to participate in assisted suicides. (pp. 17-20). Sanctioning the practice of assisted suicides would represent an especially undesirable social policy for the spinal cord injured in this country. If a right to assisted suicide is recognized by this Court, there is a grave and irreversible risk, *inter alia*, that temporarily despondent, spinal-injured persons may err in rendering literal life-and-death decisions. (pp. 20-26).

ARGUMENT.

I. The Ninth Circuit Erred In Creating A New Constitutional “Liberty Right” To Decide The Time And Manner Of One’s Death And In Elevating This Liberty Right Over The Unalienable Right To Life.

A. Introduction: Nature of Ninth Circuit’s Fundamental Error.

In Compassion in Dying v. State of Washington, 79 F.3d 790, 793-794 (9th Cir. 1996), the Circuit Court of Appeals for the Ninth Circuit (“Ninth Circuit”) concluded that “there is a constitutionally-protected liberty interest in determining the time and manner of one’s own death... [and] that insofar as the Washington statute prohibits physicians from prescribing life-ending medication for use by terminally ill, competent adults who wish to hasten their own deaths, it violates the Due Process Clause of the Fourteenth Amendment.” The Ninth Circuit erred.

The threshold premise underlying the lower court’s analysis, namely that there are “compelling similarities between right-to-die cases and abortion cases,” Compassion in Dying v. State of Washington, supra at 800, is fundamentally flawed. The assumption that “both types of cases raise issues of life and death,” *id.* at 800-801, misapprehends this Court’s decision in Roe v. Wade, 410 U.S. 113 (1973) and its progeny. In defining the privacy right of a woman to terminate a pregnancy, this Court has never characterized the countervailing interest in protecting the aborted fetus as representing an interest in preserving “life.” This Court has never ruled that the woman’s privacy rights predominate a right of “life,” as such, in the fetus. To the contrary, this Court has always emphasized in the abortion context that the existence of the fetus (regardless of the trimester involved) represents merely a “potential life.” The characterization of the fetus’ interest as being that of a “life interest,” as necessarily implied in the Ninth Circuit’s decision, represents a matter of religious and

moral values — upon which neither society, the medical world, nor this Court has ever developed a definitive consensus.¹

Contrary to the Ninth Circuit’s conclusion that its creation of a “right-to-die” may, in effect, be considered “identical to the approach used by the Supreme Court in the abortion cases,” Compassion in Dying v. State of Washington, supra at 801, the lower court’s decision violates Roe, American tradition and culture, and fundamental tenets of both Natural Law and constitutional law.

B. Deference Should Be Paid to the Supreme Authority of Natural Law Whenever Purporting to Recognize New Substantive Due Process Rights.

Natural Law is as old as Aristotle, and as classical as Cicero. See Aristotle, Rhetoric, Book 1, Chapter 13 (1373 b 4) (d. *Circa* 323 B.C.); Aristotle, Nicomachean Ethics, Book 5, Chapter 7 (1134 b. 18); Cicero, De Re Publica, III, xxii, 33 fl. 1st century B.C. It is not old-fashioned, out-of-date, or irrelevant in the context of assisted suicide, although the Ninth Circuit apparently chose to disregard this principal source of constitutional insight in its entirety. Natural Law has a special significance, value and function in establishing a safety net of rights for those segments of contemporary society which are most vulnerable to abuse, error or indifference in the application of the law — the poor, minorities, and disabled -- i.e., those who are least likely to influence the

¹ This court ruled in Roe that, “[i]f ... personhood is established, the appellant’s case [i.e., the demand for abortion], of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.” Roe v. Wade, 410 U.S. at 156-157.

political process and least able to pursue justice through the courts.

Since the inception of the United States, this nation has defined its essential identity and ultimate being by reference to Natural Law. The supreme authority of Natural Law was first ordained as a self-evident and timeless tenet in our Declaration of Independence. See *Declaration of Independence*, pars. 1-2. As Justice Jackson wrote in American Communications Association v. Douds, 339 U.S. 382, 439 (1949), the people “who led the struggle forcibly to overthrow lawfully constituted British authority found moral support by asserting a natural law under which their revolution was justified, and they broadly proclaimed these beliefs in the document basic to our freedom.”

The supreme authority of Natural Law represents a fundamental premise underlying the very existence of the Constitution. See *Declaration of Independence*, pars. 1-2. See generally J. Locke, *The Second Treatise of Government* (J. Gough rev ed. 1976) (3d ed.) (1698). Its primacy and importance should be recognized and reaffirmed on any occasion in which the courts purport to create and define wholly new constitutional rights, as purportedly involved here. In quoting ancient treatises in Geer v. Connecticut, 161 U.S. 519 (1896), this Court noted that:

“There are things which we acquire the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law; that is to say, by methods which belong to the government ... (quoting Dig. Bk., tit. 1, *De Adquir. Ref. Dom.*).

“The civil law, it is said, cannot be contrary to the natural law. This is true as regards those things which the natural law commands or which it forbids; but the civil law can restrict that which the natural law only permits. The greater part of all civil laws are nothing but restrictions on

those things which the natural law would otherwise permit.”

Id. at 523-524, quoting Pothier, *Traite du Droit de Propriete*, Nos. 27-28.

In noting that there is no calculus for determining which of the first eight Amendments are incorporated into the Fourteenth Amendment, for example, Justice Frankfurter in Adamson v. People of State of California, 322 U.S. 46, 65 (1947) (concurring opinion) wrote:

“[i]n the history of thought ‘natural law’ has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth.”

See also Faretta v. California, 422 U.S. 806, 831 n.39 (1975), quoting Thomas Paine on *Bill of Rights*, 1977, reprinted in 1 Schwartz 316 (“[T]he civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation]....”) (parenthetical in original). See further Archibald Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976) at 31-32 (“Belief in natural rights and natural law were deeply ingrained in the eighteenth-century American mind The conviction that there were such natural rights made it easy to express them in a Constitution, and then to accept the notion that a duly enacted statute in conflict with natural rights was not a binding law This early belief in the supremacy of natural law and its survival into our own time, albeit with different intellectual trappings and under other names, helped to secure acceptance of the legitimacy of judicial supremacy on matters of constitutional interpretation”).

In its decision in this case, the Ninth Circuit acknowledged that “[t]his is the first right-to-die case that this

court or any other federal court of appeals has ever decided.” Compassion in Dying v. State of Washington, 79 F.3d at 794. In purporting to review historic and legal attitudes toward life and suicide, however, the lower court did not even take into account the existence or effect of Natural Law in addressing this issue for the first time.²

C. The Unalienable Right to Life Predominates and Invalidates the Qualified Liberty Interest Identified by the Ninth Circuit.

Under Natural Law and contemporary constitutional principles (until the Ninth Circuit’s decision in this case), the Right to Life has been regarded as unalienable. The Declaration of Independence memorializes as a “self-evident” truth that all persons “are endowed by their Creator with certain unalienable Rights [and] that among these are Life....” *Declaration of Independence*, par. 2. The Right to Life necessarily supersedes

² In discussing historical attitudes toward suicide, the Ninth Circuit instead cited, *inter alia*, Greek and Roman “literature, mythology, and practice.” See *id.* at 806-808. Such references are not especially illuminating. If the attitudes commonly reflected in such sources alone were a guide to defining contemporary constitutional law, then bestiality and incest could perhaps be regarded as protected liberty rights under the Fourteenth Amendment. Likewise, the reference to the Roper Report and public opinion surveys in the Ninth Circuit’s opinion should form no basis for this Court’s ultimate analysis of the constitutional principles involved. If public opinion were to drive constitutional analysis, protected conduct such as flag burning and inter-racial marriage (indeed many of the privileges conferred by the Bill of Rights) would never have been recognized as liberty interests.

any rights or privileges conferred by civil authorities and any qualified liberty interests conferred by the courts. The tenet in our legal tradition that “[l]ife is the immediate gift of God, a right inherent by nature in every individual,” 1 Blackstone, *Commentaries* 129-130, is not an inscrutably religious or moral concept and should be given consideration and deference in this Court’s analysis of any purported constitutional “right-to-die.”

Because it is unalienable, the Right to Life predominates the Ninth Circuit’s newly identified liberty interest in choosing the time and manner of one’s death. See Arkes, “*Once More Unto the Breach: The Right to Die -- Again,*” 8 *Issues in L. & Med.* 317, 319 (1992) (“unalienable rights” are those which we are “not competent to alienate or waive, even for ourselves, because the goodness or badness of these rights was grounded in principle, quite independent of our will”). By the Ninth Circuit’s own analysis, such a liberty interest is derivative of the right of privacy and must thus be considered dependent upon Natural Law. See Griswold v. Connecticut, 381 U.S. 479, 510 n.1 (1965) (Black, J., dissenting) (“A right of privacy in matters purely private is derived from natural law”) (citation omitted).

The strongest supporters of liberty interests in general have recognized that such rights are nevertheless qualified in nature and are not unalienable like the Right to Life. Perhaps the premier advocate of individual rights, John Stuart Mill, recognized that personal autonomy represents a qualified right which may be regulated by the State. See J.S. Mill, *Utilitarianism and On Liberty* at 141 (M. Warnock Fontana Library ed. 1962) (State may prevent individual from voluntarily alienating his or her rights). See also Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackman, J., dissenting) (“[T]he ‘ability independently to define one’s identity that is central to any concept of liberty’ cannot truly be exercised in a vacuum”), quoting Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984).

The individual's rights to liberty and autonomy in American law are necessarily qualified and limited "by clear and unquestionable authority of law." Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891). Historically, the States may regulate, and have regulated, a person's course of conduct in order to prevent that individual from harming himself or herself. There are numerous areas of American law where the States have undertaken to protect individuals against their own intentions or imprudence. See Buck v. Bell, 274 U.S. 200 (1927) (sterilization); Zucht v. King, 260 U.S. 174 (1922) (vaccination); Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (upholding compulsory vaccination law and rejecting purported "inherent right of every free man to care of his own body").

The "state may regulate its internal affairs for the protection and promotion of general health, safety, morals and welfare of its citizens even where it proves inconvenient or offensive to a particular individual." Note, "Compulsory Medical Treatment: The State's Interest Re-evaluated," 51 Minn. L. Rev. 293, 297 (1966). See National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing); Schmerber v. California, 384 U.S. 757 (1966) (upholding compulsory blood-test of accused). See also People v. Carmichael, 56 Misc. 388, 288 N.Y.S.2d 931 (Genesse County Ct. 1968) (motorcyclist protective helmets); DeAryan v. Butler, 119 Cal.App.2d 674, 260 P.2d 98 (1953), cert. denied, 347 U.S. 1012 (1954) (flouridation of water); State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949), appeal dismissed, 336 U.S. 942 (1949) (snake handling as expression of religious belief); Davis v. State, 118 Ohio St. 25, 160 N.E.473 (1928) (palm reading and fortune telling). A plethora of pure food and drug laws, licensure schemes, and regulations controlling noxious substances exists which interfere with individual freedom of choice and prevent people from injuring themselves. These laws prevent individuals from subjecting themselves to risks which the government considers inadvisable and effectively preclude persons from individual self-determination and from selecting their own risks. See United States v. Walsh, 331 U.S.

432 (1947); Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192 (1912).³

The abortion cases upon which the Ninth Circuit heavily relied in fashioning its "right-to-die" present no exception to the consistent principle in constitutional law that the Right to Life always and necessarily supersedes any qualified, prospective liberty interest conferred by the Fourteenth Amendment. In Roe v. Wade and its progeny, a woman's right to terminate her pregnancy has been balanced against the mere "potential life" interest of the fetus (regardless of the trimester period involved or regardless of viability), not a definitive life interest as would inherently be involved when assessing a liberty interest purportedly possessed by an adult — whether terminally ill or otherwise.⁴ Accordingly,

³ In the context of medical treatment, a physician's professional judgment, as a general matter, is legally restricted or precluded in many situations. Laws governing narcotics, experimental drugs, and compulsory reporting demonstrate that professional judgment is not always of paramount consideration. See Rosenberg, *Compulsory Disclosure Statutes*, 280 N. Eng. J. Med. 1287 (1969). See generally Baron, "Medical Paternalism and the Rule of Law," 4 Amer. J. of L. and Med. 337, 340 ("A decision to end the life of a terminally ill patient is no more a mere 'medical question' to be decided by doctors than a decision to declare war is a mere 'military question' to be decided by generals").

⁴ In this context, the Ninth Circuit's evocative analogy to both "abortions and assisted-suicides [as] flourish[ing] in back alleys, in small street-side clinics, and in the privacy of the bedroom," Compassion in Dying v. State (continued...)

when measured against the unalienable Right to Life, the Ninth Circuit's qualified liberty interest in choosing the time and manner of one's death is conceptually inferior and, resultantly, not cognizable or viable.

D. A Right to Die Is Not "Implicit in the Concept of Ordered Liberty."

The newly created right of "choosing the time and manner of one's death," Compassion in Dying v. State of Washington, 79 F.3d at 798, does not, of itself, have an experiential reality, other than for individuals who either contemplate the affirmative taking of their lives or actively harbor such a desire. No readers of these words, apart from those having suicidal ideation, either know or have an opportunity to know the time or manner in which they are to die. Accordingly, from the outset, any such "right" is

⁴(...continued)

of Washington, 79 F.3d at 801, appears to be strained. In the words of the lower court, the "tragic consequence" if a woman was required to terminate her pregnancy without the assistance of a medical professional is that she would risk serious personal injury to herself or even perhaps death in extreme cases of neglect by the non-professional. Such "tragic consequence" seems less compelling and realistic in the context of a terminally ill patient, where death itself is the desired end. The real tragedy in such circumstances is not that a **professional** is not able to facilitate the death, but rather that the patient has not been sufficiently comforted by attendant health care practitioners or supported by family and friends in the first instance, such that the uncertain fate of death holds more promise to that individual rather than his or her continued existence.

substantially more abstract than the types of concrete interests previously recognized by this Court as being afforded Fourteenth Amendment protection. See Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925) (child rearing and education); Griswold v. Connecticut, 381 U.S. 479 (1965) (intercourse for purposes other than procreation); Eisenstadt v. Baird, 405 U.S. 438 (1972) (decision whether to bear child); and Roe v. Wade, 410 U.S. 113 (1973) (abortion).

In general, this Court has deferred extending constitutional protection to purported due process rights unless such interests are considered "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." Palko v. Connecticut, 302 U.S. 319, 325-326 (1937). See also Moore v. East Cleveland, 431 U.S. 494 (1977) (characterizing liberty interests as being those which are "deeply rooted in this Nation's history and tradition"). This Court has cautioned that "[s]ubstantive due process" analysis must begin with a careful description of the asserted right, for 'the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" Reno v. Flores, 507 U.S. 292, 302 (1993). See also Bowers v. Hardwick, 478 U.S. at 190 ("[T]here should be ... great resistance to expand the substantive reach of [the due process clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed fundamental").

As the Ninth Circuit itself appropriately noted in its decision, the creation of a new liberty interest should reflect "the conscience, traditions, and fundamental tenets of our nation." Compassion in Dying v. State of Washington, 79 F.3d at 802. The purported "right-to-die" created by the lower court in this case, however, does not reflect such tradition nor does it represent an interest "implicit in the concept of ordered liberty." See Palko v.

Connecticut, 302 U.S. at 325-326. To the contrary, suicide and assisted suicide have been historically viewed as crimes under our heritage and law. Suicide was prohibited under the English common law probably as early as the 13th century. See Compassion in Dying v. State of Washington, *supra* at 808. See also 2 H. de Bracton (c. 1250) reprinted in *On the Laws and Customs of England* 423 (S. Thorn trans., 1968). John Locke specifically opposed suicide as being against Natural Law and the principle of self-preservation. See Thomas J. Marzen, et al., *Suicide: A Constitutional Right*, 24 Duq. L. Rev. 1, 42 (1985). By 1868, 21 of the then 37 states in this country prohibited assisted suicide. *Id.* at 25. Today, a substantial majority of the States continue to outlaw assisted suicide. Julia Pugliese, Note, *Don't Ask — Don't Tell: The Secret Practice of Physician-Assisted Suicide*, 44 Hastings L. J. 1291, 1295 (1993). See also Compassion in Dying v. State of Washington, 79 F.3d at 847 (Beezer, J., dissenting) (noting that currently 44 States plus District of Columbia prohibit assisted suicide).

The fact that courts and juries may have historically treated prosecutions of suicides with lenity and have viewed persons who attempted suicide as not being of sound mind indicates perhaps tolerance and compassion (as well as a practical understanding of the limited deterrent effect of criminal penalties for suicide), but not recognition that such conduct is commendable, "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. at 325-326, or that such purported "right" should be safeguarded from State regulation except under the most exacting standards of strict scrutiny constitutional analysis. The lack of consensus on such a right is exemplified by the procedural history of this case alone and the fact that the 3-judge panel originally hearing it decided not to recognize a constitutional "right-to-die." Compassion in Dying v. State of Washington, *supra* at 798.

The Ninth Circuit's discussion of the individual circumstances of an AIDS patient identified by the fictitious name

of Smith, see *id.* at 814, evokes a powerful image for which only the most callous or heartless could not feel compassion and sympathy. A timeless "law school adage," although a cliche, is nonetheless true: bad cases make for bad law. It should not be an acceptable practice for this Court to reason alone from specific examples like the ones described by the Ninth Circuit, no matter how sympathetic, in attempting to identify and define for the entire Nation the parameters of constitutional law and the existence of fundamental liberty interests.

E. A Right-to-Die Was Not Presaged or Mandated by this Court's Ruling in Cruzan.

Aside from misapprehending the decisions in Roe v. Wade and its progeny, the Ninth Circuit also misconstrued this Court's decision in Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990). Contrary to the Ninth Circuit's characterization of that decision, Cruzan involved the refusal of unwanted medical treatment and was not a "right-to-die case...." Compassion in Dying v. State of Washington, *supra* at 799. More importantly, this Court's decision in Cruzan did not "necessarily recognize[] a liberty interest in hastening one's own death," as the Ninth Circuit has concluded. Compassion in Dying v. State of Washington, *supra* at 816. Nothing in the text of the Justices' opinions in that case, nor subsequent interpretations of this decision by courts (other than the Ninth Circuit in this particular case) have suggested that Cruzan stands for the proposition that the Constitution requires or supports recognition of a "right-to-die." To the contrary, the majority in Cruzan concluded that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." See Cruzan v. Director, Missouri Dept. of Health, 497 U.S. at 282. See also *id.* at 300 (Scalia, J., concurring) ("[T]he power of the State to prohibit suicide is unquestionable").

Likewise, the Ninth Circuit erred in equating an individual's decision to act affirmatively and directly to hasten his or her death with the decision to refrain from receiving intrusive or extraordinary medical treatment. The interests implicated when deciding to terminate unwanted medical treatment are not necessarily equivalent to the interests involved when terminating an unwanted life. Although the Ninth Circuit declined to recognize so, there is a profound difference in the conduct of physicians "prescribing medication ... for the purpose of enabling a patient to end his life," with a patient's "act of refusing or terminating unwanted medical treatment." Compassion in Dying v. State of Washington, 79 F.3d at 802.

In this case, the Ninth Circuit should not have rejected so casually the philosophical and legal distinction between acts of commission and omission and between active conduct which promotes death versus passive conduct which merely permits the natural process of dying to occur. Compassion in Dying v. State of Washington, 79 F.3d at 821. Physician-life-ending conduct, which was not approved by Cruzan, but which would now be authorized according to the Ninth Circuit's decision, would be profoundly different in kind from the type of conduct addressed by this Court in Cruzan. "Assisted suicide" would require doctors to play an active role and be a causal agent of their own patients' deaths in violation of the Hippocratic Oath.⁵ "Assisted suicide"

⁵ The Ninth Circuit's characterization of the Hippocratic Oath as "hav[ing] no greater import in deciding the constitutionality of physician assisted-suicide than it did in determining whether women had a constitutional right to have an abortion," Compassion in Dying v. State of Washington, *supra* at 829, suffers from the same infirmity discussed earlier in this brief, namely, the lower court's apparent failure to appreciate that a "life" interest in the fetus has never been acknowledged as being
(continued...)

would cause patients to die not from the natural symptoms of their underlying disease, but rather from death-inducing "medication" administered from their treating physicians' own hands. See Cruzan v. Director, Missouri Dept. of Health, 497 U.S. at 300 (Scalia, J., concurring) (commenting that suicide "consists of an affirmative act to end one's life; refusing treatment is not an affirmative act 'causing' death, but merely a passive acceptance of the natural process of dying").

Accordingly, given the Ninth Circuit's mistaken interpretations of this Court's prior decisions in Roe v. Wade, 410 U.S. at 113 and Cruzan v. Director, Missouri Dept. Of Health, 497 U.S. at 261 and that court's erroneous analysis of those factors which are essential in order to create new substantive due process rights (especially where such a purported interest implicates, and intrudes upon, the unalienable Right to Life), the decision recognizing a constitutional "right-to-die" should be reversed, and such purported "right" should be declared invalid.

II. Alternatively, If This Court Were To Recognize A Constitutional "Right-to-Die," It Should Ensure That Such Right Would Be Rigidly Qualified And Never Applied Against The Interests Of The Disabled.

A. Sanctioning Assisted Suicide Will Place Undue Pressure on the Disabled.

If this Court were to recognize a constitutional "right-to-die," despite the many and profound obstacles which should properly preclude it from so doing, the *amicus* NSCIA

⁵(...continued)
implicated in this Court's abortion decisions, in contrast to the "life" interest which would undeniably and intrinsically be involved in an adult person's decision to terminate his or her existence.

takes special exception to the inadequate weight given by the Ninth Circuit to the State's interest in preserving the sanctity of life and in protecting the disabled from being indirectly and unduly encouraged to participate in assisted suicides.

The Report of the Council on Ethical and Judicial Affairs, see Joint Appendix B at 133, specifically cites as realistic the "slippery slope" concern that "[p]ermitting assisted suicide opens the door to policies that carry far greater risks." *Id.* at 140. According to the Report,

"if assisted suicide is permitted, then there is a strong argument for allowing euthanasia. It would be arbitrary to permit patients who have the physical ability to take a pill to end their lives, but not let similarly suffering patients die if they require the lethal drug to be administered by another person. Once euthanasia is permitted, however, there is a serious risk of involuntary deaths."

Id. at 140. See also *Compassion in Dying v. State of Washington*, 79 F.3d at 853 (Beezer, J., dissenting) ("The poor, the elderly, the disabled and minorities are all at risk from undue pressure to commit physician-assisted suicide, either through direct pressure or through inadequate treatment of their pain and suffering").

In its decision, the Ninth Circuit specifically commented upon "slippery slope" concerns and the related fear "advanced by some representatives of the physically impaired ... that certain physical disabilities will erroneously be deemed to make life 'valueless.'" *Compassion in Dying v. State of Washington*, *supra* at 825.⁶ The lower court purported to "recognize the legitimacy of

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In its decision, the Ninth Circuit never defined precisely what it meant by the term "terminally ill adults,"

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these concerns," *id.* at 825, but then rather cavalierly dismissed them with the chilling observation that:

"seriously impaired individuals will, along with non-impaired individuals, be the beneficiaries of the liberty interest asserted here — and that if they are not afforded the option to control their own fate, they like many others will be compelled, against their will, to endure unusual and protracted suffering."

Id. at 825.

The Ninth Circuit's reasoning here completely misses the concerns of disability organizations such as the *amicus* NSCIA. The NSCIA and its members are not interested in securing the "benefit" of the right-to-die espoused by the Ninth Circuit. *Id.* at 825. Instead, the NSCIA is committed to improving its clients'

⁶(...continued)

although it did comment in its discussion of mootness that "the most common classification of terminally ill persons limits that group to individuals who are expected to die within six months." *Id.* at 796, n.4. Although the lower court appeared to restrict its recognition of a constitutional "right-to-die" to such "terminally ill" persons, there appears to be no logical reason to suppose that such a right would ultimately be restricted to this group alone, if this Court were to agree with the Ninth Circuit and affirm the creation of an assisted suicide "right." Indeed, if a right-to-die were recognized as having constitutional dimension, the Equal Protection Clause could be invoked in subsequent cases to invalidate the requirements of "terminal illness" and "mental competency" described in the Ninth Circuit's decision as impermissibly treating similarly situated groups of patients differently.

quality of life. In this regard, the lower court's priorities are misplaced. If an appreciable segment of the population is not being properly cared for, such that some of its members request assistance at suicide, the more compassionate solution is not to confer a constitutional right to permit such conduct (and thus eliminate the problem along with the patient), but rather to redouble the efforts of health care professionals to better respond to the needs of the patients under their care, to treat pain and other discomfort more aggressively through stronger medications or otherwise, to better alleviate physical and emotional suffering, and to better counsel persons regarding pain management techniques. See generally Report of the Council on Ethical and Judicial Affairs, Joint Appendix B at 141-142.

B. The Risk of Error in the Life-Death Decision Process for Spinal-Injured Persons Is Grave.

Of further and even greater concern to the *amicus* NSCIA is the grave risk of irreversible error in the literal life-and-death decisions the Ninth Circuit's decision would encourage. That court's rationalization that "should an error actually occur[,] it is likely to benefit the individual by permitting a victim of unmanageable pain and suffering to end his life peacefully and with dignity at the time he deems most desirable," Compassion in Dying v. State of Washington, 79 F.3d at 824, misapprehends and trivializes the concerns of the NSCIA for those disabled by spinal injuries, most especially the newly injured.

No doubt many tragic and sympathetic images of human suffering among the terminally ill may be invoked in support of the position that this Court should sanction the practice of assisted suicide. Perhaps equally (if not more) compelling, however, are the experiences of those individuals who may only temporarily regard themselves as in effect being terminally ill, who may for a short period of time subjectively believe that their lives are no longer worth living, and whose lifestyles have been so

substantially affected that their family members and health care providers would objectively support their desire to terminate their life, if such an option were given constitutional recognition.

To appreciate the inherent risk, it may be useful for this Court to learn and weigh the most current statistical data regarding the incidence of traumatic spinal cord injury in the United States. The following information was compiled primarily by researchers with the National Spinal Cord Injury Statistical Center at the University of Alabama using data from the regional SCI Centers funded by NIDRR. Such information is reported in Factsheet 2: "*Spinal Cord Injury Statistical Information*," the most recent edition of which was published by the NSCIA in August, 1995.

Every year, approximately 8,000 to 10,000 new spinal cord injuries are sustained by Americans, mostly teenage males, primarily as a result of vehicle accidents, acts of violence, sports-related injuries and falls. Id. The highest per capita rate of injury occurs between the ages of 16-30 years. Id. The average age at injury is 33.4 years, the median age at injury is 26 years, and the most frequent age at injury is 19 years. Id. Motor vehicle accidents are the leading cause of spinal cord injury (44%), followed by acts of violence (24%), falls (22%), sports (8%), and other (2%). Id. Approximately two-thirds of sports injuries are from diving. Id.

The primary symptom of spinal cord injury is paralysis which takes two forms: 1) paraplegia, which is paralysis affecting the legs and lower parts of the body, and 2) quadriplegia, which is paralysis affecting the level below the neck and chest area and which involves both the arms and the legs. Id. Paralysis is often accompanied by a partial or complete loss of sensation and various bodily functions, as well as a host of other secondary medical problems, such as: demineralization of bone, reduction in pulmonary function, dysfunction of the kidney, bladder and bowels, sexual dysfunction, muscle spasms, skin sores, and chronic pain. Id. Individuals with SCI encounter other problems

beyond these physical symptoms, such as: coping with the stigma of being disabled, barriers to employment opportunities, difficulties expressing sexuality, and other social and personal issues which can be a major part of living with a spinal cord injury. *Id.*

Since 1988, 45% of all spinal cord injuries have been classified as "complete," meaning that the injuries have resulted in a total loss of sensation and function below the injury level; 55% of spinal injuries are classified as "incomplete," meaning that the individual involved experienced only a partial loss of sensation and function below the injury level. *Id.* Slightly more than one-half of all injuries result in quadriplegia. *Id.* However, the proportions of quadriplegics increase markedly after age 45, comprising two-third of all injuries after the age of 60 and 87% of all injuries after the age of 75. *Id.* Most people with neurologically complete lesions above C-3, who survive their injury, become dependent upon mechanical respirators to breathe. *Id.* Overall, 85% of SCI patients who survive the first 24 hours after their injury are still alive 10 years later. *Id.*

As stated in this brief when discussing the "Interest of the Amicus," *supra*, p. 2, few injuries are considered as debilitating as a spinal cord injury. Such injuries most frequently occur abruptly during one's relative youth as a result of a sudden accident, giving the affected individual and his or her family essentially no time to prepare emotionally for what may both initially and ultimately require a drastic alteration in the injured person's lifestyle. Factsheet 2, *supra*. Obviously, it is not uncommon for the affected individual to become seriously depressed and to question whether his or her life, given the nature and extent of the restrictions which may be imposed by the disability, is worth living. Not infrequently, the newly spinal-injured in particular may harbor thoughts about the quality of their existence and may speculate whether their lives, with little hope for a recovery, continue to have value. The process of emotional adjustment, of course, varies greatly among the individuals involved. Commonly, such

process may progress through distinct stages somewhat comparable to the emotional adjustment which individuals may experience as a result of the death of a loved one.

It is in this context, that the Ninth Circuit's response to the express concern that "certain physical disabilities will erroneously be deemed to make life 'valueless,'" *Compassion in Dying v. State of Washington*, 79 F.3d at 825, seems incomplete and hollow. The lower court's rationalization that

"[o]rganizations representing the physically impaired are sufficiently active politically and sufficiently vigilant that they would soon put a halt to any effort to employ assisted suicide in a manner that affected their clients unfairly,"

id. at 825, appears to be unduly optimistic and uninformed. The *amicus* NSCIA, as just one example, although constituting the largest civilian organization in its field, is (like most disability organizations) a not-for-profit corporation with limited financial resources. Owing to its network of local chapters and support groups and its peer assistance counseling programs, the NSCIA is perhaps in a slightly better position than most national disability organizations to assure that certain newly injured individuals are receiving sufficient care and encouragement, are retaining hope, and are being empowered to confront the obstacles their injuries may present to them. Nonetheless, given the thousands of newly injured persons across the country each year and the limited financial resources available to the organization, it is more likely and more realistic to expect that the NSCIA would be able only to respond to specific inquiries from its members and clients, rather than proactively discover individual cases in which severe despondency and/or tragic errors in its clientele's expectations may occur. Until suicidal ideation becomes more socially and culturally acceptable and common, moreover (a "value" which is antithetical to the NSCIA's mission and a judgment which it hopes this society never establishes as an ideal), it is likely that most persons contemplating suicide would not readily or publicly

disclose their intentions, making it that much more difficult for the NSCIA to identify and respond to an individual's need. Over time, assisted suicides in this context could be portrayed and encouraged as being an heroic sacrifice to permit a reallocation of limited medical resources to others and to alleviate a "burden" on the time and finances of the disabled person's family. Those opting to live could be viewed as "selfish" and as constituting a drain on society and their loved ones.⁷

⁷ The Dutch experience with euthanasia, cited in the Council on Ethical and Judicial Affairs in the Joint Appendix at 141, demonstrates the risks of sanctioning physician-assisted suicide. In the Netherlands, there are strict criteria for the use of euthanasia which are similar to the criteria proposed for assisted suicide in the United States. In a leading Netherland's study, see *id.*, however, researchers found that, in about 28% of the cases of euthanasia or physician-assisted suicide, the strict criteria were not fulfilled, suggesting that some patients' lives were ended prematurely or involuntarily. In the 1991 Remmelink Report, moreover, more than one-half of the Dutch physicians considered it appropriate to initiate the subject of euthanasia with their patients. See Rothman, "*Doctored Death*," *The Nation* at 26 (November 18, 1996), reviewing Herbert Hendin, M.D., *Seduced by Death: Doctors, Patients, and the Dutch Cure* (Norton: 1996). These physicians apparently justified this practice as not constituting a form of coercion, but rather as merely enabling their patients to consider an option that they otherwise might not have raised. *Id.* In such circumstances, particularly where the individual involved has recently suffered a sudden and debilitating injury, it requires little imagination to see how the physician's initiative might

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The recognition of a "right-to-die" would undermine the mission of the NSCIA and ultimately the value society places on the lives of all of its members. To adopt the analysis of the Ninth Circuit would be to decide that our society no longer values its members insofar as they are persons with intrinsic dignity — that is, with inherent value independent of what they can do and contribute — but only insofar as they are useful, or so long as their lives have sufficient "quality." However, each individual's life is a gift bestowed and protected by the human community and by the ultimate forces that make up the cycle of birth and death. As the NSCIA knows only too well from its experiences with the spinal-injured, in life there may be suffering, as there is joy. But, suffering does not render a life meaningless or worthless. "Suffering people need the support of others; suffering people should not be encouraged to commit suicide by their community, or that community ceases to be a community." Dyck, "*An Alternative to the Ethic of Euthanasia*," reprinted in *Ethics and Medicine* at 533 (Cambridge: MIT Press 1977). Persons do not, and should not, live purely unto themselves.⁸

⁷(...continued)

be interpreted as a warning ("no one would want to go through what I know is in store for you") or abandonment ("you are no longer worth caring for") or dismissal ("your life is not worth living"). *Id.*

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"No man is an island, intire of its selfe; every man is a piece of the Continent, a part of the maine ... and man's death diminishes me, because I am involved in mankind."

John Donne
Devotions Upon Emergent Occasions

Allowing a patient, guardian, or physician to determine that a "terminally ill" person's life is, in effect, "worthless" necessarily involves a subjective judgment about that person's quality of life and creates dangerous precedent. The same judgment could be applied with equal force to circumstances much different than those involved in Compassion in Dying v. State of Washington. See Siegler and Weisbard, 145 Arch. Intern. Med. 129, 130 (1985) ("We have witnessed too much history to disregard how easily a society may disvalue the lives of the 'unproductive'").

"If it becomes entrenched practice to kill by omission certain sorts of persons whose condition is very poor and whose lives are judged by others no longer to be worth living, then this method of killing surely will be extended to many other persons. Most of the cases that have attracted attention thus far has involved the very severely brain damaged — those who are permanently unconscious, severely damaged by strokes, in advanced stages of dementia due to Alzheimer's or another disease, and so on. But the various sort of damages, defect, debility, and handicap that burden human lives occur in myriad degrees, so that there are always more and less severe cases differing from one another only by degree. Unfortunately, it is not difficult to image a future America in which human life may itself be judged excessively burdensome for all persons who cannot care for themselves and have no one willing and able to care for them."

May, et al., 3 Issues in L. & Med. 203, 207 (1987).

CONCLUSION.

The judgment of the Ninth Circuit Court of Appeals should be reversed, and the purported "right-to-die" recognized by that court should be declared invalid.

Respectfully submitted,

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